

ATTACHMENT C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PROMEGA CORPORATION,

Plaintiff,

and

MAX-PLANCK-GESELLSCHAFT zur
FORDERUNG der WISSENSCHAFTEN E.V.,

Involuntary Plaintiff,

-vs-

Case No. 10-CV-281-BBC

LIFE TECHNOLOGIES CORPORATION, Madison, Wisconsin
INVITROGEN IP HOLDINGS INC. February 6, 2012
and APPLIED BIOSYSTEMS, LLC, 3:00 p.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT OF FIRST DAY OF JURY TRIAL
AFTERNOON SESSION
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB, and a jury,

APPEARANCES:

For the Plaintiff: Troupis Law Office, LLC
BY: ATTORNEYS JAMES TROUPIS,
STEWART KARGE and PETER CARROLL
8500 Greenway Blvd., Ste. 200
Middleton, Wisconsin 53562

Also present: William Linton, CEO of Promega
Craig Christenson, General Counsel

Lynette Swenson RMR, CRR, CBC
Federal Court Reporter
U.S. District Court 120 N. Henry St., Rm. 520
Madison, WI 53703 (608) 255-3821

1 For the Defendants: Parsons Behle & Latimer
2 BY: ATTORNEYS FRANCIS WIKSTROM
3 and KRISTINE JOHNSON
4 201 South Main Street, Ste. 1800
5 Salt Lake City, Utah 84111

6 Axley Brynelson
7 BY: ATTORNEYS MICHAEL MODL
8 2 East Mifflin Street, Ste. 200
9 Madison, Wisconsin 53703

10 * * * * *

11 THE CLERK: This Honorable Court is again in
12 session. Please be seated and come to order.

13 THE COURT: I'm ready to make some rulings, but
14 if you have anything you want to tell me before we get
15 started, I'll hear that.

16 MR. TROUPIS: Yes, Your Honor. We'd like to
17 address two of the matters now pending before the Court
18 if we might. I'd like to address the matter of the
19 clarification of Dr. Beyer; and I know Dr. Carroll, who
20 is here as well, would like to address the question of
21 the forensics, the extent of the original summary
22 judgment ruling.

23 THE COURT: Well, if it's brief because I've
24 read what -- all that you've written.

25 MR. TROUPIS: I will be very brief with regard
to Dr. Beyer. Because we received their response last

1 night, and I've been able to read it now, the parties
2 appear to agree that with regard to profitability,
3 process for returning profits, lost profits and like,
4 Dr. Beyer could still testify.

5 The problems arise because the total sales proof
6 appears -- it has nothing to do with the methodology
7 that the Court addressed, but within each of those
8 reports, there's a series of opinions on the total sales
9 that were involved worldwide. The figure that is in the
10 supplemental report stated on page three at 700 million
11 dollars, the Court's reach of its decision is to all of
12 the kits, we'll introduce testimony simply to the fact
13 that all those kits do, in fact, infringe and that total
14 sales figure is then that number. The problem with us
15 introducing that number based on the Court's ruling is
16 that it's unclear whether Dr. Beyer can testify to that.
17 We approached the other side to stipulate to that
18 number.

19 The alternative is some rather otherwise
20 unnecessary testimony, I think, from Guido Sandulli that
21 just simply goes through these spreadsheets to come up
22 with a total so that we can answer the first question
23 about the total number of infringing sales based upon
24 the Court's ruling.

25 The second problem occurs because we don't have any

1 idea, having twice asked the question in document
2 discovery for documents on the permitted fields, give us
3 the transaction level database of the permitted fields
4 and the amounts, and in both instances the defendants
5 indicated they don't have those documents; how they
6 intend to go forward proving it. So we're left trying
7 to decide at the very least if they're going to put in
8 some generic evidence of somehow to prove that number
9 that Dr. Beyer would be able to testify, not to a
10 quantum, but at least as to what they introduce that
11 they have included sales to institutions which
12 Dr. Dimond will have testified as institutions would not
13 be using it for the permitted uses. So that he wouldn't
14 be having a damage calculation, but he would indeed be
15 rebutting whatever proof they're apparently going to
16 present to show the permitted uses. So that -- I want
17 to isolate that as to how we saw this going forward.

18 MR. WIKSTROM: Your Honor, if I may address the
19 proposed stipulation.

20 THE COURT: Mr. Wikstrom.

21 MR. WIKSTROM: I believe it was yesterday they
22 asked us to consider stipulating to a number and I will
23 advise the Court that we are prepared to stipulate to a
24 number. It will be -- and these will be --

25 THE COURT: Of total sales.

1 MR. WIKSTROM: Total worldwide sales of the
2 relevant kits. We're trying to confirm the number.
3 It's going to be something in the neighborhood of 700
4 million, but the problem is we think that there are a
5 few kits that weren't on the list that the Court found
6 to be within the claims of the patents and so we should
7 have that by later today.

8 MR. TROUPIS: Okay. If we're capable of
9 getting that in that neighborhood, then there's not --
10 there will not likely be a problem to address that.

11 MS. JOHNSON: Your Honor, if I may address the
12 remainder of Mr. Troupis's arguments very briefly. It's
13 correct that with respect to profitability and process,
14 we believe that Mr. Wikstrom can testify to those issues
15 as long, of course, as he doesn't intrude on the Court's
16 ruling with respect to methodology.

17 As for the permitted fields, perhaps I'll have to
18 watch this play out, but I'm a bit at a loss as to what
19 Mr. Troupis is suggesting. If Dr. Dimond is going to
20 provide some rebuttal testimony on permitted
21 institutions or licensed institutions, I'm not sure what
22 Dr. Beyer could add in that regard.

23 MR. TROUPIS: Dr. Beyer does not -- Dr. Dimond
24 has no access to their customer lists, so he could not
25 isolate, he could not go through them to tell -- to

1 address those. He can address the institutions as
2 institutions. Dr. Beyer took that information and then
3 applied it to the institutional list that was provided
4 by defendants. It was the protective order that was
5 causing the problem there.

6 THE COURT: Okay. All right. So it might be
7 helpful if we started with how this case is going to go
8 forward and what I'm -- I really want to know what
9 dispute the jury is going to be called upon to decide.
10 The plaintiff is going to get up and say that these --
11 as stipulated -- first of all, "as found by the Court,
12 all of these products infringe the patents." Then the
13 plaintiff is going to say "and our worldwide sales have
14 been stipulated to be this 700 million" or whatever it
15 turns out to be. We figure that our lost profits on
16 sales of 700 million dollars would be "X" and our
17 reasonable royalty on those sales would be "Y," and
18 possibly would make an effort to show willfulness at
19 that stage?

20 MR. TROUPIS: We would likely reverse it
21 slightly. It was our intention to introduce Dr. -- we'd
22 begin our testimony with Mr. Linton, and then
23 Dr. Ballantyne doing a tutorial, and then Dr. Dimond
24 addressing many of the issues that Your Honor just
25 stated. We would then introduce through -- and we would

1 introduce at that stage, also through Dr. Dimond, the
2 royalty process; the process and obligations of keeping
3 records; how records are kept; how they're done. It
4 would introduce the license agreement and how that
5 license agreement came to be and what the understandings
6 of the parties were at that time. We would then
7 introduce the willfulness evidence at that point through
8 both direct evidence of a number of witnesses as well as
9 -- that is live witnesses as well as the deposition
10 designations. And during that process, they'll
11 demonstrate a variety of things with regard to the way
12 in which Life Technologies conducted its business, and
13 will address the enormous amount of activity, both
14 sales, support, creation of a special division, things
15 of that nature in direct contra-- in direct infringement
16 of these patents, intentionally, willfully, both through
17 its structures and through its actions.

18 In that same testimony, there will be testimony
19 about explicit customers and explicit sales that would
20 ultimately go to a potential damage calculation
21 generally, but it will come in at that point simply
22 because they're by designation.

23 THE COURT: What do you mean by this last --
24 what exactly are you --

25 MR. TROUPIS: Well, each of the witnesses is

1 going to be addressing specific sales of infringing uses
2 to specific institutions around the country and around
3 the world. That's often the context in which Life
4 Technologies willfully infringed the patents, and that
5 will provide that background to the Court and the jury.

6 THE COURT: So that's what it's relevant to;
7 willfulness?

8 MR. TROUPIS: Relevant to willfulness, but it
9 has the effect as well of addressing in advance, and in
10 fact there's counter designations which we've included
11 from the defendants, the idea that some of these uses
12 may have been permitted. So in a sense some of that
13 permitted and nonpermitted uses comes in there as well
14 simply because it can't be separated out from that.

15 THE COURT: Okay.

16 MR. TROUPIS: We would then introduce evidence
17 from the CFO of Promega with regard to exact
18 profitability and meeting the balance of the criteria in
19 order for the computations to be made. It was at that
20 point that we had anticipated potentially using
21 Dr. Beyer as well in that profitability analysis. So
22 that's the way we anticipated our case going in.

23 THE COURT: And when you say your
24 understandings of the meeting of the license agreement,
25 what are you suggesting?

1 MR. TROUPIS: Well, they're not about -- well,
2 it is the -- during the course of the negotiations, the
3 question of permitted and nonpermitted uses was
4 addressed by the parties, not so much to the question of
5 the definition of nonforensic use or forensic use which
6 the Court has already addressed, but in fact there were
7 offers made of these other areas which were declined
8 which goes to the heart of whether or not they
9 subsequently -- we expect that they're going to defend
10 this willfulness by suggesting well, we understood it to
11 mean something else or we thought we could do these
12 activities without violating the patents. And so in
13 anticipation of that, we'll introduce evidence, direct
14 evidence, that in fact they did know; they were told;
15 they did turn these down; they did know what they were
16 doing; and then they subsequently created all of this
17 organizational structure shortly after those meetings in
18 fact, as the evidence will show, in which they just
19 pointblank went ahead and sold into all of these
20 infringing areas. So that evidence helps us understand
21 that sequence of events.

22 THE COURT: So that's relevant to willfulness
23 you're saying.

24 MR. TROUPIS: Willfulness, yes.

25 THE COURT: And Mr. Wikstrom, your plan when

1 plaintiff rests?

2 MR. WIKSTROM: Your Honor, we will defend
3 against willfulness, of course. And Your Honor, I want
4 to make it clear that by agreeing to stipulating to what
5 the total sales are, I don't mean to reargue any matter
6 that the Court has already decided, but I want to make
7 it clear for the record that by stipulating to that
8 number we're not agreeing to the approach that is set
9 forth in the special verdicts.

10 But given the way the Court has ruled, we will
11 stipulate to what the total sales should be without --
12 it would be our position that they're not -- the 700
13 million are not infringing sales because we have a
14 license to sell most of those. We will then disprove
15 the willfulness through our witnesses who will testify
16 to the contrary what Mr. Troupis is saying. And then
17 Your Honor, we're going to do the best we can to live
18 with the order of the Court to try to demonstrate the
19 sales that were contemplated under the license,
20 permitted under the license. I understand you've placed
21 the burden on us to do that.

22 THE COURT: Right. So how long do you think
23 it's going to take now?

24 MR. TROUPIS: We anticipate our case will be in
25 some time Thursday. We'll finish some time Thursday, I

1 believe, based on, again, subject to the usual provisos,
2 but I think we'll be done by Thursday.

3 THE COURT: We won't be able to hold trial on
4 Friday afternoon. I have a meeting I have to go to, but
5 we could bring the jury in at 8:30 and work until 12:30.

6 MR. WIKSTROM: Your Honor, I have a problem in
7 that regard. We agreed that we would make, I believe,
8 five of our witnesses available live so that they
9 wouldn't have to -- their depositions wouldn't have to
10 be read. I've been asking counsel now for days to tell
11 us when they think they might need those witnesses
12 because they have to be flown in. They've told us about
13 two, but as to the remaining witnesses, this is all news
14 to us that they're now going to be finished on Thursday.
15 I need to know --

16 THE COURT: Of course you do.

17 MR. WIKSTROM: -- exactly who they want and
18 when they want us to try to have them there. We'll do
19 our best to accommodate that schedule, but we haven't
20 been given the schedule.

21 MR. TROUPIS: I apologize, Your Honor. I
22 thought we had indicated the two we anticipated calling,
23 and at this point, I did not anticipate calling the
24 others in our direct case. Is there some --

25 MR. WIKSTROM: I think there's a

1 misunderstanding because in an email exchange that I had
2 with Mr. Karge --

3 MR. TROUPIS: I apologize.

4 MR. WIKSTROM: In an email I exchanged with
5 Mr. Karge yesterday, I was under the impression that
6 plaintiffs still wanted us to present the other
7 witnesses. If they don't, that's fine. I just need to
8 know one way or the other.

9 MR. TROUPIS: No, we do not. I apologize if
10 there was a misunderstanding.

11 THE COURT: So let me understand, are the two
12 that Mr. Wikstrom knows about now, are those the only
13 two that he needs to produce this week?

14 MR. TROUPIS: That's correct.

15 MR. WIKSTROM: And just may I, Your Honor?

16 THE COURT: Yes.

17 MR. WIKSTROM: Mr. Sandulli and Mr. --

18 MR. TROUPIS: Hall.

19 MR. WIKSTROM: -- Hall?

20 MR. TROUPIS: Those were the two.

21 MR. WIKSTROM: Okay. We're good then.

22 THE COURT: Did you want to say anything about
23 Mr. Beyer then, Mr. Wikstrom?

24 MR. WIKSTROM: Your Honor, Ms. Johnson is
25 addressing the merits on Dr. Beyer.

1 THE COURT: Okay.

2 MS. JOHNSON: Your Honor, our position is, as
3 we set forth in the filing last night, would remain the
4 same. With respect to any intent by Dr. Beyer to offer
5 any testimony on quantum of infringing sales or method
6 for arriving at that, any of the bound methodology that
7 the Court has stricken, we would certainly object to
8 that.

9 THE COURT: But I think now with the ruling
10 that the burden is on you to show what amount of those
11 sales was not infringing, that really does not become a
12 problem.

13 MS. JOHNSON: I would agree. Yes, Your Honor.

14 THE COURT: All right. So Mr. Beyer, Dr. Beyer
15 can talk about what he thinks a reasonable royalty would
16 be; he can talk about the total sales because that will
17 be a stipulated amount; and he can talk about what he
18 thinks lost profits should be. But he cannot estimate
19 what falls outside the license and he doesn't need to.

20 One of the objections to Dr. Beyer's testimony
21 concerned issues with defendant's data. I mean he
22 certainly can criticize the data that defendants put on,
23 but he can't go -- he can't say that data is absolutely
24 wrong. Here is my data, which is better.

25 MR. TROUPIS: Oh, I think that that's probably